SOVEREIGN IMMUNITY—GREAT BRITAIN—CENTRAL BANK OF NIGERIA IS NOT AN ORGAN OF THE NIGERIAN STATE; IN A SUIT ON A LETTER OF CREDIT ISSUED BY THE CENTRAL BANK OF NIGERIA SOVEREIGN IMMUNITY IS NOT AVAILABLE TO THE BANK; STARE DECISIS DOES NOT APPLY IN INTERNATIONAL LAW. *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356 (C.A.).

INTRODUCTION

At its apogee in the nineteenth century, sovereign immunity was a generally recognized public international law doctrine. In its strictest form, it posed an absolute bar (absent consent) to suits against a state or its property in the courts of another state. In the twentieth century nation-states began to conduct trading activities, which in the nineteenth century had been considered a non-governmental pursuit. As a result, pressures arose to abolish the immunities of state-traders.[1]

Those who wished to preserve the absolute immunity of states came into conflict with those who wished to restrict the availability of immunity to those situations where the state was performing *acta jure imperii* (public acts or acts of state; literally, acts of power) as contrasted with *acta jure gestionis* (private acts or commercial acts; literally, acts of management).[2] The debate between the absolute and restrictive schools grew intense during the decade following the Second World War; the weight of authority and opinion shifted away from the absolute theory.[3]

The 1970's have been a time of consolidation of opinion in favor of the restrictive rule. The Basle Convention[4] created a restrictive standard for much of Europe. In the United States, 1976 saw both the enactment of restrictive

1. Basic English language sources on the history and development of sovereign immunity are: U.S. DEP'T OF STATE, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY, (Dec. 1963) a Policy Research Study by J. Sweeny; S. SUCHARTIKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); P. SHEPARD, SOVEREIGNTY AND STATE-OWNED COMMERCIAL ENTITIES (1951); and E. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933). The best short, comprehensive introduction to the subject area is the abstract in the Dep't of State Study, *supra* at i-viii. Citations to most of the important older articles on the subject area are collected in 2 D. O'CONNELL, INTERNATIONAL LAW, 841 n.1 (2d ed. 1970).

2. *See* 2 D. O'CONNELL, INTERNATIONAL LAW, 844-46 (2d ed. 1970); 2 G. DELAUME, TRANSNATIONAL CONTRACTS, ch. XI, 15-16b (1975).

3. *See* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1951).

4. The European Convention on State Immunity (Basle, 1972) 11 INT'L LEGAL MATERIALS 470 (1972) was recommended in Resolution 72-2 of Jan. 7, 1972 by the Committee of Ministers of the Council of Europe to all member states; and came into effect in 1976, 16 INT'L LEGAL MATERIALS 766 (1977). *See* Sinclair, *The European Convention on State Immunity*, 22 INT'L & COMP. L.Q. 254 (1973); and *Sovereign Immunity from Judicial Enforcement: the Impact of the European Convention on State Immunity*, 3 COL. J. TRANSNAT'L L. 130 (1973).

immunity as positive law by Congress[5] and a parallel development in the act of state field with the plurality opinion of the Supreme Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[6] Only England among major Western nations still strictly adhered to absolute immunity.

The decision of the Privy Council in the *Phillipine Admiral*[7] changed that. The defense of sovereign immunity was rejected in that in rem action, because the ship, although owned by the Phillipine government, was engaged in commercial trading. The Privy Council tried to narrow the scope of their decision as much as possible. To this end they affirmed in dicta the rectitude of the rule of absolute immunity in in personam actions. The present case lies in personam; and neither the Court of Appeal nor the House of Lords, which has accepted appeal,[8] is bound by the decision of the Privy Council.[9] The decision in the *Phillipine Admiral*, however, is plainly inconsistent with the notion of absolute immunity, and with the position that the absolute doctrine should not be questioned. The case was a crack in the English judiciary's support for the doctrine; but no one expected the foundation to crumble so soon.

Several factors contribute to the importance of the present case. If upheld by the House of Lords, the decision will move England foursquare into the restrictive immunity camp. This has two ramifications. First, it will probably influence decisions on the same point in other Commonwealth jurisdictions. Second, while England was the last major industrial nation to cling unswervingly to absolute immunity, the doctrine still has appeal for Third World nations. If England opts for restrictive immunity Western nations will be united on this question. To the extent that developed nations' laws on the point are consistent with one another, their negotiating position vis-à-vis less-developed nations will be stronger. The decision is also important because this case is only one of several arising from the same set of facts[10] and the outcome of the litigation in any of the jurisdictions could indirectly affect the outcome in others.[11] Finally,

5. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, Oct. 21, 1976; 90 Stat. 2892; 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602-1611 (Supp. 1977). *See Sovereign Immunity—the Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L. L. J. 429 (1977).

6. 425 U.S. 682 (1976).

7. "Phillipine Admiral" v. Wolhelm Shipping (Hong Kong) Ltd., [1976] 2 W.L.R. 214 (P.C.). *See* Chinkin, *Trading Activities by Foreign Sovereign States and the Law of Sovereign Immunity*, 39 MOD. L. REV. 597 (1976); and Shaw, *Sovereign Immunity and the English Courts*, 126 NEW L. J. 632 (1976).

8. Marston, *Sovereign Immunity for Commercial Transactions: the Trendtex Case*, 11 J. WORLD TRADE L. 280, 283 (1977).

9. Marshall, *The Binding Effect of Decisions of the Judicial Committee of the Privy Council*, 17 INT'L & COMP. L. Q. 743 (1968).

10. Others are National American Corporation v. Federal Republic of Nigeria, 420 F. Supp. 954 (S.D.N.Y. 1976), 425 F. Supp. 1365 (S.D.N.Y. 1977); and Judgment of Dec. 2, 1975, D. Ct. of Frankfurt, G.F.R., [1976] NEUE JURISTISCHE WOCHENSCHRIFT 1044-46, *sub nom.* Nonresident Petitioner v. Central Bank of Nigeria, 16 INT'L LEGAL MATERIALS 501 (1977).

11. This has already occurred. The Judgment of Dec. 2, 1975, *supra* note 10, plainly influenced the Court of Appeal in the instant case. [1977] 2 W.L.R. 356, 369, 382 (C.A.).

the reasoning of the court in its discussion of stare decisis has policy significance for international law, especially in common law jurisdictions.

FACTUAL BACKGROUND[12]

In early 1975, Nigerian federal and state agencies contracted with eighty suppliers for delivery of a total of twenty million tons of cement at Nigerian ports over a period of twelve months. The contracts included liberal provisions for demurrage and incorporated an irrevocable letter of credit issued by the legislatively created[13] Central Bank of Nigeria (the Bank). One of the contracts was between the Nigerian Ministry of Defense and a supplier who contracted in turn with Trendtex for delivery of the cement. By agreement, a new irrevocable letter of credit was issued by the Bank to Trendtex through a correspondent bank, which did not confirm.

It was not possible for Nigerian ports to handle the quantities of cement which soon began to arrive. By July, more than three hundred ships were waiting to unload at the already filled berths of the Lagos/Apapa port complex. This and other problems led to a *coup*. The new government took various steps, both unilaterally and through negotiations with suppliers, to alleviate the congestion. Disputes arose with Trendtex and payments on the letter of credit were stopped.

In November, Trendtex issued a writ claiming money owed on the letter of credit (rather than on the purchase contract)[14] and sought an injunction barring removal from the jurisdiction of certain of the Bank's funds held by the correspondent bank. After hearings, the magistrate ordered the temporary injunction continued until trial.

The Bank then applied to the Queen's Bench Division to set aside the writ of summons and the injunction. The application rested on two grounds: first, that the Bank was a part of the government of Nigeria, and as such had sovereign immunity in in personam actions; second, that the assets attached were part of the external reserves of the Nigerian government, and thus the order infringed the sovereign immunity of Nigeria. The judge accepted both of these arguments. He rejected the notion of restrictive immunity as precluded by authority.[15]

ISSUES

The primary question was whether sovereign immunity was available to the Bank. The Court of Appeal approached this question from two points of view. The first approach assumed that absolute immunity was the rule; immunity was available if the Bank was sufficiently identifiable with the Nigerian government.

12. Unless otherwise noted, the facts are drawn from the published *Trendtex* opinions: [1976] 1 W.L.R. 868 (Q.B.); and [1977] 2 W.L.R. 356 (C.A.).
13. Central Bank of Nigeria Act, 1958; amending acts and decrees are cited at [1976] 1 W.L.R. 874. No more helpful citation is available to this writer.
14. H. GUTTERIDGE & M. MEGRAH, THE LAW OF BANKERS' COMMERCIAL CREDITS, 62-63, 205 (5th ed. 1976).
15. [1976] 1 W.L.R. at 872-3.

The issue was simply whether the Bank was an alter ego, arm, emanation or department of that government. The second approach was more complex and involved three issues. The first was the extent to which the court was bound by earlier English decisions on sovereign immunity—specifically, whether stare decisis applies to international law questions. If authority was not binding, it would become necessary to decide the second issue—whether restrictive or absolute immunity was the rule of international law. If restrictive immunity were the rule, the third issue would then be important—whether nature or purpose or some other quality determines the character of an act (*gestionis* or *imperii*) under that doctrine. Under either of these two approaches, the Bank's pleadings required consideration of a second question: whether the immunity of the funds attached might be distinct from that of the Bank, as a result of the allegation that they were in reality foreign reserves of Nigeria.

Trendtex also raised issues of waiver and estoppel. These related to communications by the Bank assuring Trendtex of the soundness of the letters of credit. They were not strenuously pressed before this court because of contrary authority.[16] The House of Lords, however, is free to consider them decisive. An assertion made before the Queen's Bench that the accounts of the Bank were a fund held in trust for Trendtex[17] was apparently dropped in the Court of Appeal. No mention of it appears in the opinions.

DECISIONS

The Justices of the Court of Appeal, Lord Denning, M.R., Stephenson and Shaw, all decided for Trendtex, but each rested his decision on a slightly different basis. All examined the matter under both of the approaches outlined above, but they could not agree on which was the most satisfactory. The greatest concord among the three was achieved under the first approach; they were unanimous in reversing the lower court's determination that the Bank was an arm or alter ego of the government of Nigeria.

A. The Alter Ego or Arm of the State Approach

The Court of Appeal considered the issue in essentially the same light as the lower court, but the three Justices each formulated the test in a slightly different manner.[18] The lower court listed the factors it thought relevant at great length.[19] The Justices of the Court of Appeals were more selective but, like the lower court, they did not always indicate which factors weighed in which direction. Lord Denning, in particular, was virtually opaque. While his colleagues and the court below at least emphasized some factor which they found finally persua-

16. [1977] 2 W.L.R. at 371.
17. [1976] 1 W.L.R. at 877.
18. [1976] 1 W.L.R. at 873; [1977] 2 W.L.R. at 370, 374, 383.
19. [1976] 1 W.L.R. at 874-76.

sive,[20] Lord Denning did not.[21] This was partly the result of his careful consideration of the case, which led him to exclude several factors which his brethren and the court below implicitly or explicitly accepted as relevant.

The most intriguing instance of exclusion was his refusal to give any positive weight to the Nigerian Ambassador's certification that the Bank was an arm of the state, on the ground that the Ambassador might apply an improper test.[22] This, coupled with the disapproving reference to hypothesized immunity for a press agency controlled by a state, casts doubt on the continuing vitality of *Krajina v. Tass News Agency*.[23] It is plain that under the restrictive doctrine *Krajina* would not be good law, so these disparaging comments may reflect only Lord Denning's judgment that a restrictive approach is best. But the refusal to give positive weight to the certificate may also indicate that he would decide *Krajina* differently even under an absolute approach.

In a similar vein, Lord Denning rejected the usefulness of both Nigerian and English law on the internal immunities of legislatively created entities.[24] The judge below[25] and Stephenson[26] explicitly accepted both, though the latter would use English law merely as a "guide."[27] Lord Denning's approach marks the question clearly as one of international law, while the other may allow domestic law prejudices to creep in. Since the influence of domestic immunities law seems likely to lead to less uniformity (and a consequently confused state of the law among nations) Lord Denning's view is preferable.

These differences in the end had little practical import. All the Justices of the [redacted] Court of Appeal, like the court below, considered the Bank a hybrid: part state and part private. The absolute immunity doctrine forced them to place the institution in one sphere or the other. Unlike the lower court, they thought it was primarily private. Beneath this unanimity, there was discomfort on the part of at least two of the Justices: Stephenson and Lord Denning. Stephenson felt the alter ego question was extremely close. He finally rested his judgment on this ground, but only because he felt precluded by authority from resting it on restrictive immunity.[28] Shaw expressed no preference between alter ego and restrictive immunity beyond treating the alter ego question first.[29] Lord Denning

20. Q.B.—"discretion has to be exercised on behalf of . . . the state", [1976] 1 W.L.R. at 876; Stephenson—lack of a declaration of government status in the enabling statute, [1977] 2 W.L.R. at 373, 374, 375; Shaw—no overt indication (by name, title, or statutory declaration) of government status, *id.* at 383, 384.
21. [1977] 2 W.L.R. at 371, "on the whole."
22. *Id.* at 370.
23. [1949] 2 All E.R. 274 (C.A.). *Krajina* held that Tass had sovereign immunity in a libel action for damages. The only evidence was a portion of Tass' enabling statute and a certificate of the Soviet ambassador, both tending to show that Tass was an organ of the State. Russian law alone governed the determination whether Tass was an organ of the state and the certificate of the ambassador was given great weight.
24. [1977] 2 W.L.R. at 370.
25. [1976] 1 W.L.R. at 879, 876.
26. [1977] 2 W.L.R. at 373-4, 375.
27. *Id.* at 375.
28. *Id.* at 381.
29. *Id.* at 382-9.

was so uncomfortable with this decision that he preferred to rest his judgment exclusively on restrictive immunity grounds,[30] even though he found the Bank was not an alter ego of the Nigerian state.

B. *Restrictive Immunity*

The restrictive immunity decision is the most significant part of the judgment of the Court of Appeal. If it is the law, all the problems inherent in the alter ego approach are avoided. Reaching the decision required three steps (outlined in the *Issues* section, *supra*) and the path along the way was not an easy one for an English court. Only two of the Justices made it the whole distance.

Lord Denning led the way. In *Rahimtoola v. Nizam of Hyderabad*[31] and again in *Thai-Europe Tapioca Service, Ltd. v. Government of Pakistan*,[32] he had dissented from the traditional English interpretation of sovereign immunity[33] and articulated several exceptions to the "rule" of absolute immunity—including a commercial exception.[34] In *Trendtex*, Lord Denning abandoned the tack of finding a commercial exception and declared restrictive immunity to be the rule. Shaw agreed. Stephenson, however, felt that dicta in *Thai-Europe* to the effect that stare decisis applied in international law[35] bound him to the contrary authority of *The Parlement Belge*[36] and *Compania Mercantil Argentina v. United States Shipping Board*.[37] In order to reach the decision they did, Lord Denning and Shaw had to counter these assertions of the *Thai-Europe* justices, and negate the authority of the earlier decisions.

30. *Id.* at 371.

31. [1958] A.C. 379 (1957). The Nizam sued for money transferred by the Nizam's agent without authorization to Rahimtoola, High Commissioner of Pakistan in England, who received it on the instructions of the Foreign Minister of Pakistan. The action was disallowed on the ground that a foreign sovereign was impleaded. Lord Denning concurred on the narrower ground that it was a political act, an intergovernmental transaction, which was the basis of the action, and the conflict was not an appropriate one for judicial resolution.

32. [1975] 1 W.L.R. 1485 (C.A.). A German shipowner claimed for demurrage and damages sustained while waiting to unload the cargo of fertilizer for which the defendant had contracted. The claim was disallowed on broad sovereign immunity grounds. Lord Denning concurred on the narrower ground that neither the plaintiff nor the transaction out of which the complaint arose had any connection with England, so that England was an inappropriate forum for the case.

33. [1958] A.C. at 411-24; [1975] 1 W.L.R. at 1488-92.

34. [1958] A.C. at 422; [1975] 1 W.L.R. at 1490-91.

35. [1975] 1 W.L.R. at 1493, 1495.

36. 5 P.D. 197 (C.A. 1880). The Parlement Belge is the classic English sovereign immunity case, in which an in rem action against a packet, owned by the King of Belgium and engaged in transporting passengers and mail across the channel, was dismissed on the ground that the comity of nations required that no court entertain an action in which a foreign sovereign was impleaded.

37. 131 L.T.R. (n.s.) 388 (C.A. 1924). Plaintiff trading company chartered a merchant ship owned by the Congressionally created Shipping Board. An in personam action for the return of freight overpaid was rejected on sovereign immunity grounds. A commercial exception to the absolute rule was proposed and explicitly rejected.

Stare Decisis and the Theories of Incorporation and Transformation

A short digression is in order before we carry this inquiry further. The United Kingdom has a relatively rigid system of authority and strict rules of precedent.[38] Although there has been some relaxation in recent years, it is still true that the Court of Appeal is usually bound by its own prior decisions.[39] The Court normally sits in panels of three, whose decisions can be reversed only by the House of Lords or Parliament.[40] Judicial power to change the law is thus severely limited. Relatively few cases are appealed to the House of Lords, and Parliament tends to be most urgently pressed by domestic issues. One result, as the experience with sovereign immunity suggests,[41] is that the U.K. may find itself enforcing an international "law" long after the rule has lost its authority outside the jurisdiction.[42]

[redacted]'s solution is to declare that the doctrine of stare decisis does not apply to questions of international law at all. His conclusion results from an inquiry into two competing theories as to the place of international law in the municipal law of England. [redacted] "transformation" theory sees international law as a distinct body of opinion and practice which has no municipal authority until adopted by an English court or Parliament or by custom. Once transformed, an international rule is subject to the same rules of precedent as any other municipal law. The "incorporation" theory, on the other hand, regards international law as a distinct body of law, with a life separate from that of municipal law. According to this theory, an international rule is applied by municipal courts as it exists at the time of decision, unless it conflicts with an Act of Parliament.

Lord Denning shows, in a brief history,[43] that English decisions have not reflected either theory clearly or consistently. He and Shaw find that incorporation must be the correct rule. In support, Lord Denning cites three instances where English courts have assertedly recognized and applied changes in international law.[44] He also asserts (and Shaw relies exclusively on this argument) that if transformation were the rule, decisions by the Court of Appeal on international law would only be susceptible to change by the House of Lords or Parliament. This, he declares, would be absurd.[45]

The logic of the latter argument is open to grave doubt, for the same could be

38. *See generally* R. CROSS, PRECEDENT IN ENGLISH LAW (2d ed. 1968).
39. *Id.* at 128-40, 105-8.
40. The decisions of the Privy Council are persuasive but not binding on the Court of Appeal. Marshall, *The Binding Effect of Decisions of the Judicial Committee of the Privy Council*, 17 INT'L & COMP. L.Q. 743 (1968).
41. Although the *Basle Convention, supra* note 4, to which England is a party, was concluded in 1972 and came into effect in 1976, Parliament still has not enacted implementing legislation.
42. *See* Erades, *Is Stare Decisis an Impediment to the Enforcement of International Law by English Courts?*, 4 NETH. Y.B. INT'L L. 105 (1973).
43. [1977] 2 W.L.R. at 364-65.
44. *Id.* at 365. They are the changes in the legitimacy of slavery, the extent of territorial waters, and sovereign immunity (referring to the Privy Council's decision in the *Phillipine Admiral*).
45. *Id.* at 365, 387-88.

said with respect to domestic law in England. The problem of the extent to which precedent binds courts is a systemic one. Stare decisis as applied in England slows the process of change in all areas of the law. If international law is to be distinguished from other law for some purposes, there must be some rationale for the distinction which can become the basis of a judicial test. Sovereign immunity may be readily and commonly identified as international law, but there are many areas which are not so readily categorized: *e.g.*, human rights, and questions which arise under the EEC Charter. In order to be completely satisfying, the *Trendtex* decision should at least have articulated a standard by which the distinction could be made. If the House of Lords fails to clear up this point, there will certainly be further litigation on the question, what is within international law, and thus not governed by stare decisis.

In spite of this difficulty, the thrust of the decision on the place of international law within the domestic order is commendable. To the extent that it is influential in other (common law) systems, the decision will open judicially applied international law to more systematic development. Freeing domestic courts of the restraints of municipal systems for the purposes of international law is a step towards creation of a more coherent international legal structure. It is a small step, and in this case an ambiguous one—by giving up this measure of sovereignty, English courts actually gain a good deal of freedom—but it is a significant step nonetheless.

[redacted] freeing aspect is balanced by the qualification that an English court must apply international law as it exists. The judges' freedom will be limited by the requirement that they consider other decisions and opinions in order to discover what the international rule is. In cases where clear and recent domestic authority exists, or where no authority exists, the result would not be very different from that of the present system. The change would come in the middle ground of cases, where the law is moving. If the present decision stands, there will be more voices heard in the debate over a movement in international law.

Definition of *acta jure gestionis*

[redacted] after the problem of prior authority had thus been eliminated, the rest was relatively easy. It was established without serious dispute (in spite of Stephenson's rather strenuous requirements of proof)[46] that restrictive immunity is the internationally accepted norm and that the protected acts are *acta jure imperii* and not *acta jure gestionis*. It is worth noting that the *imperii/gestionis* distinction as to acts is essentially the same as the state/private distinction by which the Bank was judged as an entity. The big difference, and the advantage of the new rule, is that instead of trying to find the sum of the attributes of an entity, [redacted] restrictive immunity doctrine focuses on a specific act by the entity.

There is still one definitional problem: whether it is the purpose (object) or nature (quality) which is the proper test of an act. There are authorities favoring

46. *Id.* at 379-80.

both, but it has been recognized that the "purpose" test leaves room for unwarranted expansion of sovereign immunity by the expansion of government purposes.[47] The "nature" test was adopted unanimously by the *Trendtex* court.

A disadvantage of the nature test is that it may incorporate the particular applying state's 19th and 20th century notions of what is commercial and what is an act of state. This will lead inevitably to differences among municipal laws. It may also prove in the long run to be as difficult to apply as the purpose test, because it is doubtful that state transactions are (or will long remain) divisible into just two categories—commercial and political—no matter how much Latin one intones.[48]

The Attachment of the Central Bank's (or Nigeria's) Funds

The most critical part of the *Trendtex* decision from the plaintiff's standpoint was that concerning the availability of sovereign immunity for the Bank's funds in the United Kingdom. The plea was based on the claim that the moneys were actually the foreign reserves of Nigeria. Oddly, this question was given short shrift by the court. They found, with little discussion,[49] that the availability of immunity for the funds depended on precisely the same principles as its availability to the Bank.[50] There are problems with proceeding so abruptly.

First, the court plainly ignores a decision of the Privy Council which approached the problem differently.[51] It is true that the decisions of the Privy Council are not binding on the Court of Appeal, but they are persuasive authority[52] and should not be ignored. Second, if the decision described in the previous section, on the place of international law in the municipal system, is to be implemented, there should have been a more thorough inquiry into what the international law on the point is. Such an inquiry was made on the more general question whether absolute or restrictive immunity is the rule. Failure to make the inquiry is hardly excused by the fact that opinion on this particular issue is considerably more divided than on the general theory.[53] Third, the claim of the Nigerian government gives the dispute a political flavor. Proper consideration of this claim would seem necessarily to include discussion of the propriety of having decisions on such matters made by the judiciary rather than the executive. It was apparently helpful that a German court, in a case arising out of the same circumstances,[54] came to the same conclusion; but there was no discussion of the rationale of that decision.

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47. 2 G. DELAUME, TRANSNATIONAL CONTRACTS, ch. XI, 16 (1975).
48. 2 D. O'CONNELL, INTERNATIONAL LAW, 845-46 (2d ed. 1970). It is interesting to note that the French, who developed the modern use of the distinction as a means of differentiating administrative (*imperii*) from ordinary (*gestionis*) court jurisdictions, have abandoned it for that purpose. Lauterpacht, *supra* note 3, at 224.
49. Stephenson expressed misgivings but concurred, [1977] 2 W.L.R. at 382.
50. *Id.* at 371, 389.
51. Juan Ysmael & Co., Inc. v. Government of the Republic of Indonesia, [1955] A.C. 72 (P.C. 1954).
52. *See* note 40 *supra*.
53. 2 D. O'CONNELL, INTERNATIONAL LAW, 844-45 (2d ed. 1970).
54. *See* note 8 *supra*.

This is not to say that the decision to make the immunity of the funds to attachment depend on the same principles as the immunity of the Bank to suit is indefensible. But the announcement of principles and their application are different matters. It is not perfectly clear how the restrictive immunity principles are to be applied in a situation like the present one. What is sufficient to mark the funds as commercial in the face of Nigeria's claim? The House of Lords may have further thoughts on the point.

[redacted]

The English Court of Appeal has made several contributions to international law in its decision in the *Trendtex* case. The court has loosened the bonds of domestic precedent and thus internationalized international law in England. Perhaps this will lead to similar developments in other countries as well. The court has also moved England into line with the rest of Europe (which is important to the EEC) and with the rest of the industrial West (which is important to the OECD in its continuing negotiations with the Third World) on the question of sovereign immunity. Finally, even if the House of Lords reverses on every issue (which seems unlikely) the decision contributes to the growing literature on the restrictive immunity doctrine.

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